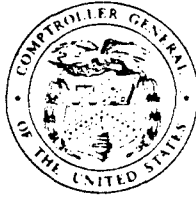


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

57059

FILE: B-184119

DATE: September 26, 1975

MATTER OF: New England Engineering Co., Inc.

97407

DIGEST:

IFB contained contradictory periods for work completion (90 and 180 days). Since it is clear that qualified low rejected bid was submitted on basis of 90-day completion, but it was unclear upon which completion period other bidders submitted bids, ambiguity in IFB kept bidders from competing on equal basis. Recommendation made that contract awarded to second low bidder should be terminated for the convenience of the Government and requirement resolicited clearly stating Government's minimum needs with respect to completion period.

New England Engineering Co., Inc. (NEECO), protests the rejection of its low bid under invitation for bids (IFB) No. 523-75-30 issued by the Veterans Administration Hospital, Boston, Massachusetts (VA Hospital), on April 4, 1975, for the replacement of the air-conditioning system in a surgical suite.

By the May 21, 1975, bid opening, the following bids were received:

NEECO	\$449,796
J. W. Praught Co. (Praught)	478,000
Delbrook Engineering Corp.	639,000
Charles P. Blouin	601,457

The following letter was attached to and signed by the same company official who executed the low bid of NEECO:

"In reference to the above mentioned project we wish to qualify our bid as to the completion date of 90 days.

"Our bid is based on a completion date depending on the delivery of equipment.

"Delivery of equipment could possibly delay the project slightly beyond the 90 completion date."

By letter of May 23, 1975, NEECO attempted to explain the above letter attachment to the contracting officer stating that it fully intended to comply with the bid plans and specifications and that the letter was neither referenced in nor meant to qualify the bid. The letter was solely meant to inform the contracting officer of the considered serious possibility that no firm could perform the contract within 90 days because of problems with the delivery of equipment. NEECO further stated that the consulting engineers for the project had suggested that the letter be attached to the bid. If the letter should be construed to qualify its bid, NEECO suggested that the letter be deleted and award made to NEECO as the low bidder. NEECO certified that "our bid stands as specified for a 90 day delivery, * * *."

By letter of May 27, 1975, the contracting officer informed NEECO that its bid was nonresponsive because the attached letter, stapled to the bid form, was considered to be part of the bid form and clearly qualified the bid in a material respect. The contracting officer further informed NEECO that the instructions to the bidders provide that any oral advice given by the architect engineer for the project will not be binding which, in effect, could not justify the letter attachment to the bid.

On May 30, 1975, the contracting officer awarded Contract No. V523C-585 to Praught as the low responsive bidder. By letter dated June 3, 1975, NEECO appealed the decision of the contracting officer to our Office. Notice to proceed with the work is being withheld pending our decision in the matter.

The Director of Supply Service, Department of Medicine and Surgery, VA, submitted a documented report to our Office on July 8, 1975. The report advised that preaward discussions between the Director's staff and the contracting officer as to the responsiveness of the NEECO low bid dealt with paragraph 8(g) of the IFB's supplementary general provisions which provides that "Work is to be completed within 90 calendar days." However, after award, the Director's staff learned for the first time that there was an

ambiguity in the IFB. In this regard, page 2 of Standard Form 21, the completed bid form signed by each bidder, called for completion of the project within 180 calendar days after receipt of the notice to proceed.

The Director has informed us that it appears the bidders were not aware of the ambiguity in the completion date. Also, on June 5, 1975, Praught confirmed to the contracting officer that its bid was submitted with the understanding that the work was to be performed within 90 days as follows:

"Mr. Praught was told about the clerical error on Standard Form 21, stating that the delivery date was different than the one that was in the specification.

"He was asked if his bid was submitted with the 90-day limit in mind. Mr. Praught stated that he had submitted the bid with the understanding he would perform in 90 days."

Because NEECO did not question the differing completion dates prior to bid opening, and knowingly qualified the 90-day completion date called for in the specifications, the Director concurs in the contracting officer's decision to reject the NEECO bid. The VA further argues that the ambiguity is not a "compelling" reason to either cancel the invitation and/or disturb the award to Praught, citing 52 Comp. Gen. 285 (1972).

By letter of July 9, 1975, NEECO's counsel, after apparently learning of the IFB ambiguity from the VA report to our Office, argues that, although NEECO's bid may have indicated problems in complying with the 90-day completion date, the bid did not take exception to and was therefore responsive to the 180-day completion date in the signed bid form. Counsel stressed the use of the word "slightly" in the letter attached to the bid: "Delivery of equipment could possibly delay the project slightly beyond the 90 completion date." (Emphasis added.)

41 U.S.C. § 253(a) (1970) requires that invitations for bids and specifications shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency. The

purpose of statutes requiring the award of contracts to the lowest responsive, responsible bidder after advertising is to give all bidders an equal chance to compete on Government contracts and secure for the Government the benefits that flow from free and unrestricted competition. United States v. Brookridge Farm, 111 F. 2d 461 (10th Cir. 1940). To enable bidders to compete on equal terms, an invitation must be sufficiently definite to permit the preparation and evaluation of bids on a common basis. Federal Contracting Corporation, B-183342, June 30, 1975, 75-1 CPD 398.

Our Office has long acknowledged the materiality of completion schedules and dates and the substantial effect they may have on the competitive position of bidders. See 53 Comp. Gen. 320 (1973); 52 id. 32 (1973); 51 id. 518 (1972). For one bidder to be competing on the basis of a completion schedule possibly twice as long as that of another bidder clearly has an effect on the competitive position of those bidders.

From the record, VA clearly intended to include only a 90-day completion period. However, the ambiguity in the IFB cannot be resolved by any reasonable interpretation, one way or the other, and no order of precedence clause was contained in the IFB.

It is clear from NEECO's bid that it was submitted in contemplation of the 90-day completion period. The letter attachment that accompanied NEECO's bid referred only to that period. In this regard, the letter attachment addressed to the contracting officer contains a clear qualification to the 90-day requirement, specifically refers to the IFB, and evidences the signature of the same company official who signed the bid. Our Office has consistently held that extraneous documents submitted with a bid must be considered part of the bid. See J. A. Wynne Company, Inc., B-181807, November 18, 1974, 74-2 CPD 268. The qualification noted a "slight" delay beyond 90 days depending upon the delivery of certain equipment. If NEECO's bid had been based on the 180-day completion period, there would have been no need to stress the minimal aspect of the delay, or even mention the possibility at all.

On the other hand, there is no way to determine the basis upon which the other bids were submitted - 90 or 180 days. Any determination of this nature must be based upon the bid as submitted. Post-bid opening statements as to the intent of the bidder cannot

be considered. See Kipp Construction Co., B-181588, January 16, 1975, 75-1 CPD 20. Therefore, the post-bid opening statement of Praught made to the contracting officer that it had submitted the bid with the understanding the work would be completed within 90 days is not for consideration.

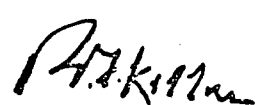
Conceding the ambiguity in the IFB, VA cites 52 Comp. Gen. 285 (1972), for the proposition that the ambiguity is not a compelling reason to either cancel the invitation or disturb the award.

Federal Procurement Regulations (FPR) § 1-2.404-1 (1964 ed. FPR circ. 1) permits the contracting officer to cancel an invitation after bids have been opened only if there is a compelling reason to reject all bids. An example of such an instance is when inadequate, ambiguous, or otherwise deficient specifications are cited in the invitation for bids. FPR § 1-2.404-1(b)(1) (1964 ed. FPR circ. 1). In interpreting this section, we have held that the mere utilization of ambiguous or deficient specifications in an IFB does not, of itself, constitute a compelling reason to cancel the IFB. 52 Comp. Gen., supra. We have refused to permit cancellation if the bids under the IFB would satisfy the Government's actual needs and no prejudice would result from an award because bids submitted to a revised solicitation would not be on a different basis than originally submitted. See Immigration and Naturalization Service, B-182949, March 19, 1975, 75-1 CPD 165, and cases cited therein.

However, the ambiguity in this case would not result in the fulfillment of the Government's needs, since it would permit completion on the basis of 180 days when the Government's actual needs are 90. Further, as indicated above, it would be inappropriate to rely upon any statements regarding intended completion made by the bidders after bid opening and there is no way of knowing from the bid of the successful bidder that it was bidding on the basis of 90 days completion. For that matter, there is no way of knowing from the bids whether the higher bids are based on 90 or 180 days. Therefore, we are unable to conclude that all bidders were competing on an equal basis because of the uncertainty occasioned by the VA's inclusion in the IFB of two contradictory completion periods. In view of the circumstances, we recommend that the Praught contract be terminated for the convenience of the Government and the requirement be resolicited clearly setting forth the minimum needs of the Government with respect to the completion period.

B-184119

As this decision contains a recommendation for corrective action to be taken, it is being transmitted by letters of today to the congressional committees named in section 232 of the Legislative Reorganization Act of 1970, Public Law 91-510, 31 United States Code § 1172.


Deputy Comptroller General
of the United States